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# Implementation of Directive 2004/38 in the United Kingdom

HELENA WRAY and ALISON HUNTER\*

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## 1. INTRODUCTION

One problem with an article of this kind is that the boundaries are not always clear. Some of the most contested rights are those that do not derive from the Directive itself but from other legislation or from principles of EU law (cases such as *Teixeira, Ibrahim and Zambrano*).<sup>1</sup> However, they are associated with free movement rights as a whole and it would be artificial not to consider them in an analysis of this kind. While the article's main focus is on the Directive, therefore, the free movement rights that originated outside the Directive are also considered as part of the discussion.

The Directive applies to Union citizens and refers to Member States. The implementing regulations refer to the EEA and to EEA nationals (which are to be interpreted as including Switzerland and Swiss nationals) even when applying rights that do not arise from the EU's free movement legislation. However, as this article shows, rights are not

always correctly transposed or only after many years' delay. It is therefore possible that EEA nationals do not have access to exactly the same rights as Union citizens, depending upon the precise position under the implementing legislation. Rather than try to distinguish on each occasion and to avoid juxtaposing terms inappropriately (EEA and Union Citizen, for example), this article will use the terminology of the Directive (Union Citizen and Member State) unless the context requires otherwise but readers should be aware that rights almost always apply also to EEA and Swiss nationals except where the rights outside the Directive have not been implemented through legislation into the UK Law.

## 2. BACKGROUND AND CONTEXT

### 2.1. The UK and the EU

The UK is known as an unenthusiastic member of the EU, a characteristic which has been linked to the relatively weak European identity of the British.<sup>2</sup> This ambivalence has been historically true and shows little sign of

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<sup>1</sup> *Teixeira v Lambeth LBC* C-480/08; *Harrow LBC v Ibrahim* C-310/08; *Ruiz Zambrano v ONEM* C-34/09.

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<sup>2</sup> LUEDTKE, A. (2005) 'European Integration, Public Opinion and Immigration Policy: Testing the Impact of National Identity' *European Union Politics* 6 (1) 83–112.

dissipating. The UK's first attempt to join what was then the EEC in the early 1960s failed when it was vetoed by General de Gaulle and the UK did not become a member until 1971, a decision endorsed by a national referendum in 1975. Having joined later than the other major European economies, the UK had little influence over its foundational principles and priorities.<sup>3</sup> Membership at that point meant an inevitable ceding of control with little compensatory influence over the shaping of an institutional framework that was already well established. Thus, «the voluntary surrender of national sovereignty... created controversy that recurs to some degree with every step to deepen integration».<sup>4</sup>

Currently, this historical ambivalence is tending towards antipathy, particularly since the current Conservative/Liberal Democrat coalition took office in 2010. Opinion polls consistently show a substantial section of the population who wish to leave the EU and a majority in favour of reform (although they are not the only state to think in this way).<sup>5</sup> The United Kingdom Independence Party (UKIP), which supports withdrawal from the EU and looks likely to win a large share of votes in the 2014 European elections, is pushing all the main parties towards positions of relative scepticism. The recent rise of UKIP is not the only driver however. The two main political parties (particularly the Conservative Party) have always contained some reluctant Europeans who have put pressure on their leaderships, although the latter have generally been in

favour of maintaining membership if not, in the case of the Conservatives, further integration. The European Union Act 2011, which was sponsored by the Conservative Foreign Secretary in fulfilment of a Coalition government commitment, requires a national referendum prior to committing to any extension of EU competence. It also restates the principle of parliamentary sovereignty whereby directly effective EU law takes effect only by virtue of an Act of Parliament, an iteration whose legal rather than political necessity is doubtful. The Conservative Party has promised that, if it wins the 2015 election, it will hold a referendum on continued membership by 2017 following a period of attempted renegotiation of the terms of membership. Both the Liberal Democrats, historically pro-European, and the Labour Party support a referendum if the government wishes to grant new powers to the EU.

The EU has long been regarded by its critics as undermining parliamentary and national sovereignty. Recent discontent has centred on the exercise by EU nationals, particularly from accession states, of their rights of free movement which permit them to live, work and study in the UK and to access services on a non-discriminatory basis. This is presented and perceived as an immigration issue, particularly where the entry of Union citizens from the poorer member states is concerned, and has been linked both to labour displacement, particularly at the bottom end of the labour market, and benefits and health 'tourism' i.e. movement for the purposes of accessing these services.<sup>6</sup> The extent to which these perceptions are fostered by the institutional arrangements for the implementation and adjudication of free movement rights is discussed below but EU

<sup>3</sup> COOPER, R. (2012) 'Britain in Europe' *International Affairs* 1191-1203, 1192-4.

<sup>4</sup> BULMER, S. and BURCH, M. (2001) 'The «Europeanisation» of central government: the UK and Germany in historical institutionalist perspective' in Schneider, G. And Aspinwall, M. *The rules of integration: Institutional approaches to the study of Europe* (Manchester and New York: Manchester University Press) 73-96, 82.

<sup>5</sup> See, for example, poll at: <http://yougov.co.uk/news/2014/05/21/voters-uk-and-europe-are-mood-change/>.

<sup>6</sup> For a discussion of the treatment of 'benefits tourists', see Shaw, J., MILLER, N. And FLETCHER, M. (2013) *Getting to grips with EU citizenship: Understanding the friction between UK immigration law and EU free movement law* Edinburgh Law School Citizenship Studies, 27.

free movement rights have also, in the recent period, been presented within political debate as a highly problematic immigration issue. Polls have shown strong support for the view that the free movement rules are damaging and should be restricted.<sup>7</sup> There is some irony in this as it was the right wing neo-liberal government headed by Margaret Thatcher that originally promoted enlargement of the UK to include Eastern Europe.<sup>8</sup>

The political salience of EU free movement can be dated to the 2004 accession of ten mainly Eastern European countries. Unlike almost all other member states, the UK did not impose transitional controls on access by these new EU citizens to the labour market, opting instead for a registration scheme for new workers from the eight Eastern European states which had the effect, in some cases, of hindering access to welfare.<sup>9</sup> More restrictive transitional controls were placed on A2 (Romanian and Bulgarian) nationals when these countries joined the EU at the beginning of 2007.

Net migration from the EU in the eight years after 2004 is reported to have exceeded 420,000.<sup>10</sup> About 3.8% of the UK's population consists of mobile Union citizens compared to an average within the EU of 2.7% although this is still a smaller proportion than in Spain, Austria, Belgium, Ireland, Cyprus and Luxembourg.<sup>11</sup> At the end of 2013, as transitional measures over Romanian and

Bulgarian nationals came to an end, public concern and media coverage intensified dramatically, leading to some well-publicised new controls over welfare entitlements for new arrivals, discussed later in this article. It seems likely however that the numbers of A2 nationals will be far fewer than the more alarmist predictions suggested.<sup>12</sup> In May 2014, it was reported that the number of A2 nationals working in the UK decreased in the three months after transitional measures ended.<sup>13</sup> There is also little evidence that these types of migrant make heavy demands upon public services although strains may arise in a few specific areas.<sup>14</sup> Some problems around undercutting of wages have also been reported.<sup>15</sup> However, EEA immigrants make, on balance, a net fiscal contribution to the UK and this has been particularly strong since 2001, so will include the post-2004 arrivals.<sup>16</sup>

## 2.2. Free movement rights, the UK government and immigration control

If the UK is a largely compliant if unenthusiastic member state in most respects, there has always been particular resistance to EU intervention on matters which touch on immigration, or which are perceived to do so. The UK has never joined Schengen and has used its right to decide whether or not to opt into EU immigration legislation, agreed in the Treaty of Amsterdam, to avoid being

<sup>7</sup> KELLNER, P. (2013) *Putting Up with Europe* YouGov available at: <http://yougov.co.uk/news/2013/11/18/putting-europe/>.

<sup>8</sup> COOPER n.3, 1197.

<sup>9</sup> GLENNIE, A. and PENNINGTON, J. (2013) *In Transition: Romanian and Bulgarian Migration to the UK* Institute of Public Policy research, 2; *Zalewska v Department of Social Development* [2008] UKHL 67.

<sup>10</sup> VARGAS-SILVA, C. (2014) *Migration Flows of A8 and other EU Migrants to and from the UK* 3<sup>rd</sup> revision Migration Observatory pp. 4-5

<sup>11</sup> ERNST & YOUNG (2014) *Evaluation of the impact of the free movement of EU citizens at local level: Final Report* (January 2014).

<sup>12</sup> Glennie and Pennington n.9, 8.

<sup>13</sup> 'Number of Romanian and Bulgarian workers in UK falls' *Guardian* 14<sup>th</sup> May 2014: <http://www.theguardian.com/uk-news/2014/may/14/number-romanian-bulgarian-workers-falls-border-controls>

<sup>14</sup> Glennie and Pennington n.9, 17.

<sup>15</sup> *Ibid*, 17.

<sup>16</sup> Dustmann, C. and Frattini, T. (2013) *The Fiscal Effects of Immigration to the UK* Discussion Paper Series CDP No 22/13 Centre for Research and Analysis of Migration, University College London.

bound by most of the EU's immigration policy although it did opt into the first round (1999-2004) of asylum legislation and has participated in measures on carriers' liability, biometric controls and readmission agreements.<sup>17</sup> However, it did not opt into the most recent round of asylum legislation nor the Family Reunification or Long Term Residents' Directives.<sup>18</sup>

Euro-scepticism is not necessarily the dominant motivation however. All the opt-outs were decided not by the current more Euro-sceptic government but by the previous Labour government, which was broadly more favourable to Europe but was concerned with promoting selective immigration by the skilled and with checking irregular migration and asylum claims. Maintaining control over the UK's physical borders has long been viewed as a critical aspect of national sovereignty, more than for other European states who share land borders with their neighbours and for whom the question of legal presence may be more pressing than that of entry. The Labour government made instrumental use of EU competence where this was perceived to be in the national interest in protecting those borders.<sup>19</sup> In fact, Geddes argues that even the right wing and combative Thatcher administration was not as opposed to immigration co-operation as might be supposed.<sup>20</sup> In any event, since 1999, «Britain has tended to participate in coercive measures that curtail the ability of migrants to enter the EU while opting out of protective measures such as the directives on

family reunion and the rights of long-term residents that to some extent give rights to migrants and third-country nationals».<sup>21</sup>

Free movement rights are not, themselves, immigration laws but are designed to give full effect to the purposes of the EU. They thus tend to be interpreted expansively by the Court of Justice at least when there is a genuine cross-border element involved and they cut across national immigration controls. Indeed, interaction with national law is anticipated in the Directive, in respect of, for example, other family members or unmarried partners (article 3(2)). Free movement rights, particularly those involving third country nationals (TCN) family members, are generally associated with immigration rather than with economic or citizenship questions and are seen as interfering in national sovereignty in this respect.

For many years, migration from the EU was not usually regarded as problematic even though rules on questions such as family reunification, financial standing and access to services were much more liberal than the national regime. It has however been politicised in recent years. The Conservative Party manifesto in the 2010 general election promised to reduce net migration<sup>22</sup>, including from the EU, from the 'hundreds' to the 'tens' of thousands<sup>23</sup>. Another background feature has been the growing number of migrants, both EU citizens and third country nationals (TCNs), entering as the family members of EU citizens including, in some cases, British citizens. The 1999 Court of Justice decision in *Surinder Singh* found that EU citizens exercising their free movement rights had the right to family reunification

<sup>17</sup> GEDDES, A. (2005) 'Getting the best of both worlds? Britain, the EU and migration policy' *International Affairs* 81(4) 723-740, 734-735.

<sup>18</sup> For a discussion of the asylum opt-outs, see Stefanelli, J. (2011) 'Whose rule of law? An analysis of the UK's decision not to opt-in to the EU Asylum Procedures and Reception Conditions Directives' *International and Comparative Law Quarterly* 60(4) 1055-1064, 1056-1061.

<sup>19</sup> Geddes n. 17.

<sup>20</sup> Geddes n. 17, 733.

<sup>21</sup> Geddes n. 17, 734.

<sup>22</sup> 'Annual net migration to UK was 212,000 in final quarter of 2013' *The Guardian* 22<sup>nd</sup> May 2014.

<sup>23</sup> SYMONDS, S. (2011) 'The Numbers Game' *Journal of Immigration Asylum and Nationality Law* 26(2), 138-155.



under EU law not only in the state to which they moved but after returning to their own member state.<sup>24</sup> This opened a route by which some British citizens could bypass restrictive national rules and procure the admission of third country national family members by exercising their rights in another member state for a few months before returning to the UK. The '*Surinder Singh* route' has become part of the common knowledge base for families seeking to be reunited in the UK in the face of increasingly restrictive national laws and it even has several Facebook groups.<sup>25</sup>

Even without the *Surinder Singh* decision, the family reunification rights of EU citizens were becoming problematic, particularly as the EU expanded. A particular issue is the suspicion that the EU regime is not sufficiently robust in preventing sham marriages, themselves a recurring theme in British immigration law,<sup>26</sup> and, after the *Metock* decision in 2008, the UK made largely unsuccessful attempts to obtain a wider interpretation of an abuse of rights. While national laws require parties to the marriage to establish that the marriage is genuine, the burden of proof in EU cases is on the government and individual consideration must be given to each claim. There have been several reports of sham marriages involving EU citizens, and the EU regime has been described by politicians as a 'loophole'.<sup>27</sup> However, it is not clear whether the concern is that the marriages are not genuine or that these are migrants

who would not be permitted to enter under national laws; sometimes the issues seem to be conflated. For example, in 2011, visa officers were asked to report applications made overseas for a family permit where there were concerns about abuse. 276 applications (just under 2% of total applications) were referred, of which 78 were found to have 'adverse immigration histories' and 19 had criminal histories while «[i]n some cases there were also concerns about the authenticity of the relationship. The government concluded that: «Whilst these numbers are small, it suggests that some migrants are abusing the Free Movement Directive in order to gain legitimate entry to the UK which would not otherwise be possible due to their adverse immigration history».<sup>28</sup>

While not the only motive (another may have been to inhibit article 8 claims based on marriage), initiatives such as the former certificates of approval scheme, which required migrants to obtain permission to marry from the government (routinely refused to irregular and short-term migrants), and the new pre-marriage investigations established by the Immigration Act 2014 aim to prevent marriages between EU citizens and third country nationals that, once they have taken place, give rise to residence rights.<sup>29</sup> A background feature in the UK is the presence of a large body of irregular migrants (estimated at about 600,000).<sup>30</sup> Although the UK's courts have forced the government to modify its stance to some degree, the national rules require such migrants to leave the country before they can regularise their position on the basis of marriage, to meet other demanding criteria, for example, in respect of their

<sup>24</sup> *R. v Immigration Appeal Tribunal Ex p. SSHD* C370/90.

<sup>25</sup> See, for example, <https://www.facebook.com/groups/alison48amanda48/>

<sup>26</sup> Wray, H. (2006) 'An Ideal Husband? Marriages of Convenience, Moral gatekeeping and Immigration to the UK' *European Journal of Migration and Law*, 8(Autumn) 303-320; UK European Migration Network National Contact Point (2012) *Misuse of the right to family reunification: Marriages of convenience and false declarations of parenthood*, Home Office.

<sup>27</sup> UK European Migration Network National Contact Point n. 16, 16; Wray n.16, 316.

<sup>28</sup> UK European Migration Network National Contact Point Ibid, 25.

<sup>29</sup> Wray n. 26; Immigration Act 2014.

<sup>30</sup> GORDON, I., SCANLON, K., TRAVERS, T. and WHITEHEAD, C (2009) *Economic Impact on the London and UK Economy of an Earned Regularisation of Irregular Migrants to the UK*, Greater London Authority.

financial position and to pass government-imposed tests to detect sham marriages.<sup>31</sup> None of this can be required of the spouses of EU citizens and the easiest way to avoid their residence is to prevent the marriage from taking place. Hence the emphasis in both the certificates of approval scheme and its successor is on testing the marriage and prohibiting it from taking place if it does not pass these tests.

The ability of TCN family members in general, not just spouses, to use EU law as the basis of a claim to remain has also started to be seen as problematic. While, as mentioned above, the UK's record on implementation of EU law has historically been fairly good, in recent years, implementation of some Court of Justice jurisprudence on free movement and third country family members has been tardy and reluctant, an issue discussed below in the section on implementing legislation. Some other flashpoints have emerged. One is access to benefits and services. In order to minimise welfare claims by newly arrived intra-EU migrants, the government applies a 'habitual residence' criterion and this has caused tension between the UK and the Commission. Welfare claimants must show both that they are habitually resident in the UK and that they have the right to reside in the UK. The first part of the test is uncontroversial as it applies both to UK citizens and Union citizens. The second part however cannot be applied to UK citizens who have an unconditional right to live in the UK while Union citizens must show that they are exercising their free movement rights as a worker, self-employed, student or self-sufficient Union citizen in order to claim. It is thus regarded as discriminatory. In 2011, the European Commission sent a reasoned opinion to the UK government concerning the test

and, in May 2013, the Commission announced that it was making a referral to the Court of Justice for infringement proceedings (the domestic jurisprudence is discussed below). This decision was widely reported in the British media as a measure that would hinder the UK's battle against 'benefits tourism'.<sup>32</sup> This step did not cause the government to reconsider; it has introduced and is planning new restrictions on access to benefits by Union citizens, discussed below, some of which may not conform to EU law.

There is also the related question of the status of those who are deemed to fall outside the ambit of free movement rights because they are not working, studying or self-sufficient. These individuals may or may not have applied for and been refused benefits or social housing and may come to the attention of the authorities because they are homeless and sleeping rough or for another reason. In 2010, the government piloted a scheme that attempted to expel EEA nationals who were sleeping rough, usually from Central or Eastern Europe. This was regarded by many as unlawful and, in any event, was largely pointless as the individual concerned had the right to re-enter the UK (although, as discussed below, the government has now taken steps to limit their re-entry).<sup>33</sup> Another area of tension is the deportation of foreign nationals who have committed criminal offences (foreign national prisoners or FNPs). As Shaw et al point out, transposition of Directive 2004/38, with its layered protection for criminal EU citizens, coincided with an intensification by government of efforts to deport FNPs. While those with rights under EU law were excluded from the rigour of the domestic law, public and even parliamentary

<sup>31</sup> For a discussion of the UK courts and family migration, see Wray, H. (2013) 'Greater than the sum of their parts: UK Supreme Court Decisions on Family Migration' *Public Law* 2013 (October) 838-860.

<sup>32</sup> *Social security benefits: Commission refers UK to Court for incorrect application of EU social security safeguards* European Commission Press Release 30<sup>th</sup> May 2013; Shaw, Miller and Fletcher n. 6, 27-28.

<sup>33</sup> Shaw, Miller and Fletcher n. 6, 31-33.

discourse did not usually make the distinction. All FNPs who meet the criteria in national law are considered for deportation, including Union citizens who are treated as potentially eligible for deportation although the government had to abandon the presumption that all EEA nationals who had served sentences of 24 months or more should be deported.<sup>34</sup> Nonetheless, they are liable to be placed in immigration detention while their position is investigated at the end of their sentence.<sup>35</sup>

### 2.3. The institutional context

A contributory factor to the association of free movement rights with immigration is their institutional and legal framework. Membership of the EU required profound adaptation within government and commentators noted that the UK's centralised system of government, majoritarian electoral system, common law legal system and adversarial politics were not in tune with EU models of multi-levelled governance, consensus building and legal regulation drawn from civil law traditions. Broader circumstances such as weak public support for the EU and political differences with key EU partners also had a role.<sup>36</sup> However, while detailed consideration of policy was delegated to the relevant ministry, responsibility for legal aspects lay with the government's legal office, the Treasury Solicitor's Department. Legal advisors in this Department, which was regarded as a branch of the Cabinet Office and therefore highly authoritative, oversaw transposition and implementation of EC legislation across government, which may explain why the UK record on this has historically been good compared to other major member states although this has not always been the case in

recent years where free movement rights are concerned.<sup>37</sup>

As regards the implementation of free movement rights, the Strategy, Immigration and International Group sits within the Home Office, undertakes strategy and policy work and liaises with other departments and external bodies including the European Commission. There is also coordination between departments with responsibilities related to free movement rights, for example, the Department of Work and Pensions (welfare entitlements) and the Department for Communities and Local Government (housing policy).<sup>38</sup> However, recognition of the right to exercise free movement rights in individual cases has always been determined by the immigration service (although welfare agencies decide on entitlement to services). Between 2008 and 2013, immigration functions were carried out by the United Kingdom Border Agency (UKBA), an executive agency supervised by the Home Office. Responsibility for implementation of free movement rights was spread across all areas of operations. Visa staff decided requests for EEA family permits, border staff oversaw admissions into the UK and the immigration team handled requests for registration certificates, residence cards and authorisations for workers from accession states.<sup>39</sup> Finally, the criminality and detention team dealt with the deportation of EEA nationals and their family members (although its functions were subsumed into a new Home Office organisation, Border Force, in 2012). In 2013, following wide criticism of its poor service, UKBA lost its executive agency status and its work was returned to the direct control of the Home Office through a new organisation, UK

<sup>34</sup> Shaw, Miller and Fletcher n. 6, 30.

<sup>35</sup> Shaw, Miller and Fletcher n. 6, 29-30.

<sup>36</sup> Bulmer and Burch n.4.

<sup>37</sup> Bulmer and Burch n.4, 868; Perkins, R. and NEUMAYER, R. (2007) 'Do Membership Benefits Buy Regulatory Compliance? An Empirical Analysis of EU Directives 1978-99' *European Union Politics* 8(2) 180-206, 183.

<sup>38</sup> Shaw, Miller and Fletcher n. 6, 14.

<sup>39</sup> Shaw, Miller and Fletcher n. 6, 14-15.



Visas and Immigration, but the distribution of responsibilities was unchanged. In all cases, staff spend the majority of their time on questions of national immigration control and EU free movement rights would only be a small proportion of their work load. It is easy to see how, in that environment, a permissive immigration culture, in which applicants are regarded as asking to be excepted from the usual norms of control, rather than a facilitative free movement culture would predominate. Even if staff are in a unit devoted to EU applications, they may have spent their previous career working in national immigration and be inculcated with the culture of that environment. Shaw et al found, in their study of implementation, that immigration officers quite often treat free movement applications as if they were immigration applications and subject to the standards of documentary proof and credibility judgments associated with immigration control.<sup>40</sup> Refusal rates have been climbing steadily since at least 2006.<sup>41</sup>

Another institutional factor is the legal structure of control. The main immigration legislation is the Immigration Act 1971. S.3(1) provides that only British citizens (and a few Commonwealth citizens who, for historical reasons, have a 'right of abode') may enter the UK without leave. An exception to this is made in the Immigration Act 1988, s.7(1), which provides that leave is not required by a person who is entitled to enter by virtue of an enforceable EU right. This is legally correct but the reference to 'enforceable EU rights' and the failure to amend the main legislation suggest that it is an exceptional state of affairs. There is no other primary legislation which explicitly gives force to free movement rights, notably the right not only to enter the UK but to live there. Sec-

ondary implementing legislation is called the 'Immigration (European Economic Area) Regulations', even though the power to make them derives primarily from the European Communities Act 1972, reinforcing the impression that free movement rights are an exception carved out of the immigration system rather than a freestanding system of civil entitlements. As well as this primary and secondary legislation, there is guidance to officials, the European Casework Instructions, discussed further below and which may be accessed via the UK Visas and Immigration website.<sup>42</sup>

Appeals against refusal of registration certificates or residence cards, refusal of admission, and deportation (but not refusal of welfare entitlements) are brought in the Immigration and Asylum Chamber of the First Tier Tribunal in the first instance and from there to the Upper Tribunal, still the Immigration and Asylum Chamber. Tribunal members are all legally trained and there are many good quality decisions although the standard is not consistently high. As discussed below, however, the defensive and literal approach associated with domestic immigration law sometimes seeps into the decisions on free movement rights.<sup>43</sup> Thus, there may be an excessive emphasis on evidential questions or on a past immigration history of non-compliance although the Upper Tribunal and higher courts have corrected some of the poor decisions in that regard.<sup>44</sup> Where the UK's implementing legislation does not reflect the Court of Justice jurisprudence, there is a tendency to rely only on the domestic law.<sup>45</sup> While some of this complex jurisprudence may be difficult to assimilate, inadequate or delayed guidance and rule amendments have consequences for decision-makers and judges as well as individ-

<sup>40</sup> Shaw, Miller and Fletcher n. 6, 43-45, 48-9.

<sup>41</sup> UK European Migration Network National Contact Point n.16, 23, Table 5; Shaw, Miller and Fletcher n. 6, 7-8.

<sup>42</sup> <https://www.gov.uk/immigration-operational-guidance/european-casework-instructions>.

<sup>43</sup> Shaw, Miller and Fletcher n. 6, 43-45.

<sup>44</sup> Shaw, Miller and Fletcher n. 6, 43-6.

<sup>45</sup> Shaw, Miller and Fletcher n. 6, 39-40.

uals who, in the absence of specialised advice, may not appreciate that they have rights that are not apparent from the face of the regulations. Presenting officers who represent the government, meanwhile, may find it hard to present a consistent line of argument.<sup>46</sup>

It has been suggested that one government tactic is to put forward legal arguments that might appeal to a domestic court but not to the Court of Justice, in the knowledge that it may be many years before the issue is determined at the European level.<sup>47</sup> While any court or tribunal may make a reference for a preliminary ruling from the Court of Justice under article 276 TFEU, until recently, the asylum and immigration judiciary had been instructed in a practice note to refrain from making references, leaving the decision to the President of the Tribunal, thus discouraging independent engagement with EU law by the Tribunal. Even now, most references are from the Upper Tribunal.<sup>48</sup>

The costs associated with bringing appeals are considerable. A fee of £80 for a decision on the papers and £140 for a hearing is payable (unless the appeal is against removal or there are exceptional circumstances). Legal representation will cost much more and, since April 2013, legal aid is no longer available for EEA appeals except for discrimination and domestic violence related claims or, exceptionally, if failure to provide legal aid would itself breach EU law. From 1<sup>st</sup> April until 31st December 2013, 187 applications were made for exceptional funding in respect of the entire immigration system and 3 were granted so the likelihood of an EEA exceptional claim succeeding is minimal.<sup>49</sup> The costs con-

nected with bringing a case to the Court of Appeal or the Supreme Court are prohibitive for almost all private individuals and the demise of legal aid in this area makes it less likely that decisions will be challenged at the highest level. This makes the question of the quality of Tribunal decisions even more important.

### 3. IMPLEMENTATION OF EUROPEAN FREE MOVEMENT RIGHTS INTO UK LAW

#### 3.1. The Immigration (European Economic Area) Regulations 2006

In the United Kingdom, the Directive has been implemented by the Immigration (EEA) Regulations 2006, as amended.<sup>50</sup> The Directives that were repealed by Directive 2004/38/EC had been implemented by the Immigration (European Economic Area) Regulations 2000, as amended.<sup>51</sup> Those Regulations were repealed and replaced in full by the Immigration (European Economic Area) Regulations 2006.

The 2006 Regulations are made under Section 2 (2) of the European Communities Act 1972 and Section 109 of the Nationality, Immigration and Asylum Act 2002. Under the statute, the regulations become law automatically unless there is an objection either from the House of Commons or the House of Lords; in other words, they do not need to be affirmed or actively approved by Parliament. The Immigration (EEA) Regulations 2006 were laid before Parliament on 30 March 2006 and would have been revoked if either House of Parliament had passed a resolution to annul them within forty days. So, despite

<sup>46</sup> Shaw, Miller and Fletcher n. 6, 49-50.

<sup>47</sup> Shaw, Miller and Fletcher n. 6, 49.

<sup>48</sup> Shaw, Miller and Fletcher n. 6, 15.

<sup>49</sup> Ministry of Justice (2014) *Legal Aid Exceptional Case Funding Application and Determination Statistics: 1 April to 31 December 2013* Ministry of Justice Statistics Release.

<sup>50</sup> The Immigration (European Economic Area) Regulations 2006, (SI 2006/1003).

<sup>51</sup> Directive 67/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

the significant impact these Regulations have on an acutely political topic, they were not actively scrutinised by Parliament.

As required by Directive 2004/38, the Immigration (European Economic Area) Regulations came into force on 30 April 2006. The new Regulations followed the structure that had been used in the 2000 Regulations. In part 1, there are definitions covering the categories of persons who are referred to in the Directive. Part 2 sets out the free movement rights conferred on EEA nationals. Part 3 provides for the provision of residence documentation, part 4 for the exclusion and removal of EEA nationals, part 5 contains procedural issues on admission and part 6 sets out appeal rights in relation to decisions taken under these Regulations. The Regulations apply to all EEA nationals (the nationals of all EU states plus Norway, Iceland and Liechtenstein) and Swiss nationals who are accorded the same rights as EEA nationals, even though the Swiss free movement agreement was not automatically amended by the Directive. This was a conscious decision to ensure uniformity for all EEA and Swiss nationals.

### 3.2. Amendments to the Regulations

Since initial implementation, the Regulations have been amended on six occasions; in 2009, 2011, twice in 2012 and twice again in 2013.<sup>52</sup> This was done by way of amending regulations laid before Parliament in the same fashion as the original Regulations.

#### 3.2.1. The 2009 amendments

The 2009 Amendment Regulations provided a power to the Secretary of State to exclude EEA nationals from the United King-

dom in certain circumstances, introduced a power to detain EEA nationals for the purpose of examining whether they were exercising Treaty rights and made a few amendments to tidy up the 2006 Regulations. Although initially the regulations appeared to be making the use of forms compulsory, this was soon clarified, as the Home Office confirmed that valid applications need not be made on a form.<sup>53</sup> Overall they were uncontroversial and were considered as a tidying up exercise.

#### 3.2.2. The 2011 amendments

The 2011 amendments gave effect to the *Metock* judgment which had been decided in July 2008. The slow implementation of *Metock* exemplifies the reluctance of the British government to adopt wholeheartedly principles of EU law where these are perceived to undermine national controls. The 2006 Regulations had interpreted rights very narrowly, imposing rules equivalent to national laws on those who entered the UK from outside the EU. This was consistent with the decision in *Akrich* that a non EU spouse of an EU worker may not avail himself of freedom of movement rights if he or she has been residing in the EU unlawfully.<sup>54</sup> The Home Office thus insisted that the privileges of European free movement law could only extend to those who had first joined the EEA national in another EEA country (e.g. the EEA national's home country) according to the immigration laws of that country.<sup>55</sup> Third country nationals who were not lawfully resident and who had not accompanied or joined the EEA citizen in the United Kingdom were unable to benefit from the Regulations. This particularly affected TCNs who

<sup>52</sup> SI 2009/1117; SI 2011/1247; SI 2012/1547; SI 2012/2560; SI 2013/1391 and SI 2013/3032.

<sup>53</sup> Letter dated 9 June 2008 from ILPA to the EEA team at the Home Office.

<sup>54</sup> *SSHD v Akrich* C-109/01.

<sup>55</sup> ILPA information sheet – Families of EEA Nationals dated 5 August 2008.

entered the United Kingdom either lawfully or illegally and then married there; they had to comply with the far more restrictive tests required in domestic law, including stringent maintenance and accommodation requirements. TCNs who were irregular migrants were expected to return to their home countries and apply for entry clearance again under the far more stringent domestic rules. This compared unfavourably with the position under the 2000 Regulations which had required that, to enter or remain in another Member State as the spouse of an EU citizen, all that was needed was to show marriage (by providing a marriage certificate) and that the EU citizen was exercising a Treaty right.

The *Metock* decision made it clear that the more restrictive 2006 rules were incompatible with EU law. After the decision, the Irish government took four days to bring its legislation into line with the judgment. The United Kingdom took nearly three years. Although the principle was fully implemented in guidance in November 2008, the Immigration (EEA) Regulations 2006 remained unamended until the 2011 amendments. This reluctance to change the Regulations meant that, for nearly three years, the Regulations provided that national immigration rules applied to family reunification by EU citizens in a far wider range of circumstances than permitted by EU law. The Home Office rationalised its failure to change the regulations by saying that this was not necessary for the judgment to have effect in the UK and they had been compliant since November 2008. They dismissed concerns about confusion to applicants and caseworkers by saying that direct family members were not disadvantaged as the Home Office was administratively compliant. This ignores the difficulty that such family members had in ascertaining what the correct rules were. The next bullet point in the document containing this exchange stated utterly out of context: 'We continue to take a robust approach to abuse of marriage and family reunification issues

by EEA nationals, as well as to abuse of all areas of free movement' indicating the predominant concerns of the Home Office.<sup>56</sup>

### 3.2.3. *The first 2012 amendments*

The first set of amendments passed in 2012 were primarily made to incorporate CJEU jurisprudence and, again, there was considerable delay between decisions being made and amendment.<sup>57</sup> The judgments incorporated by the 2012 amendments included *Chen*, which had been decided in 2004, an eight year gap and an extreme example of delay in implementation.<sup>58</sup> Under these amendments, primary carers of self sufficient EU citizen children under 18 were finally provided with rights of entry to, and residence in, the United Kingdom where the denial of the right would prevent the EU citizen child from exercising their own right of residence.<sup>59</sup> This followed an Upper Tribunal case suggesting that there is not just a right under European law to remain in the UK, subject to meeting the criteria set out in *Chen*, but also to enter the United Kingdom. It stated explicitly that a family permit (rather than entry clearance under domestic law provisions) was the appropriate way to deal with such an application.<sup>60</sup> This finally led to the lifting of the restrictions on working to which parents granted under the *Chen* provisions in domestic law had been subject and made UK law compatible with Article 23 of the Directive.

<sup>56</sup> International Group, UK Border Agency note on *Metock* Ruling of 5 November 2009.

<sup>57</sup> The Immigration (European Economic Area)(Amendment) Regulations 2012 (SI 2012/1547).

<sup>58</sup> *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department*, C-200/02.

<sup>59</sup> Explanatory Note to Immigration (EEA) (Amendment) Regulations 2012/1547.

<sup>60</sup> *M (Chen Parents: source of rights) Ivory Coast* [2010]UKUT 227 (IAC).

The second striking feature of these amendments, and which has been seen on many other occasions, is a very narrow interpretation of the jurisprudence which pays little regard to the policy behind a decision. The teleological approach often adopted by the Court of Justice of the European Union frequently does not lend itself to moulding into strict statutory laws which try to minimise discretion and room for interpretation. The approach taken in the United Kingdom has been to take a very literal and often restrictive view of the case law with little acknowledgement of the underlying principle of the case or regard for previously established principles in European law.

The cases of *Ibrahim* and *Teixeira* are on point. The 2012 amendments inserted Regulation 15A entitled 'Derivative Right of Residence', which aims to implement the decisions in those cases, into the 2006 Regulations. The rights, as implemented by the 2012 amendments, do not lead to permanent residence and are wholly dependent on the status of the person for whom the third country national is caring.<sup>61</sup> The narrowness of the drafting means that there is little room for variations on a factual basis from the original cases and this invariably leads to more litigation. For example, by the time of implementation, the Tribunal had already found that a worker, for this purpose, does not include a job seeker and that the derived right arises only if the parent is in work when the child begins education. This was not in accordance with the CJEU judgment in *Teixeira* in which it is apparent that rights may arise even if the parent's work ceases before education begins. In an appeal from the Tribunal decision, the Court of Appeal did not rule on the latter point and held that the definition of worker, for the purposes of Regulation 492/2011, might be more demanding than

under Directive 2004/38.<sup>62</sup> Later, the Tribunal in *Ahmed* found that a derivative right does exist, even if the EEA national was not in work when the child started education.<sup>63</sup> The delay in implementing the judgment and the determination to interpret it as narrowly as possible with no regard to the consequences and the more general principles of European law thus leads to uncertainty and confusion. The focus on restriction rather than rights can also clearly be seen by the specific exclusion in the definition of education of 'nursery education'.

Similarly, the definition of 'EEA national' was amended in these regulations in response to *McCarthy*<sup>64</sup> to mean only 'a national of an EEA state who is not also a British citizen' so that nationals with dual EEA and British citizenship cannot benefit from EU law when trying to bring their family members to the United Kingdom. This is particularly harsh when dual nationals are unable to fulfil domestic rules but are exercising a Treaty right in the United Kingdom and is likely at some point to lead to absurd situations. For example, a dual German/UK national worked in the UK before moving to Germany for work where he marries a TCN. If he wants to return to the UK, he would be unable to benefit from the EEA Regulations which ostensibly embody the *Surinder Singh* principle as he would have been residing and working in Germany as a German national. He would have to rely on the far more stringent domestic provisions to bring his spouse to the United Kingdom, arguably in contravention of his EU law rights.

### 3.2.4. The second 2012 amendments

Given the delay in amending the Regulations to make them compliant with *Metock*

<sup>61</sup> Although this follows the CJEU's position in paragraph 48 of *Alarape*, C-529/11.

<sup>62</sup> *MDB (Italy) v SSHD* [2013] Civ 1015.

<sup>63</sup> *Ahmed (Amos; Zambrano; Reg 15A(3))* © 2006 EEA regs [2013]UKUT 00089 (IAC).

<sup>64</sup> *McCarthy v SSHD* C-126/11.



and *Chen*, it was no surprise to find that the principles set out in the case of *Zambrano* which was decided in March 2011 were not included in the first round of 2012 amendments. They were however incorporated in the second set of 2012 amendments.<sup>65</sup> As with *Metock*, the Home Office had issued guidance on how they were implementing the case although it was not readily available. The implementation in the Regulations is in fact less prescriptive than the original policy guidance and is considered a fair interpretation of the case.

In relation to extended family members the Secretary of State finally accepted following *Rahman* that, to benefit from the provisions on 'other family members', the applicant need not have been residing with the European national in another member state before coming to the United Kingdom.<sup>66</sup> There was however a drastic curtailment of the right of appeal for durable partners who cannot produce 'sufficient evidence to satisfy the Secretary of State that he is in a relationship with the EEA national'.<sup>67</sup> In practice, this power does not appear to be widely used and could no doubt be subject to a lawfulness challenge given its undoubted limitation on a right of appeal.

### 3.2.5. The first 2013 amendments

A more controversial issue was fee charging, which was introduced through the first set of 2013 regulations which came into force on 1 July 2013. These changed the requirement in the 2006 Regulations for documentation to be issued free of charge. Although applications made from outside the United Kingdom remain free, those made inside the

United Kingdom now carry a charge of £55. It is unclear which document the Home Office has taken as a comparator for setting this fee, as required in the Directive, given that there is no obligation on United Kingdom citizens to hold any type of identity document.<sup>68</sup> The fee does not correspond to the fee for a passport which is currently set at £72.50 (roughly 89 Euros) or a driving licence, set at £50 (roughly 61 Euros.).

### 3.2.6. The second 2013 amendments

These are more far-reaching as they try to restrict the meaning of worker and jobseeker. They set out how long somebody can be deemed to be a 'jobseeker' both on their initial entry to the country and once they have worked in the United Kingdom. In summary, they only allow a person to remain a jobseeker for longer than six months if they are able to provide 'compelling evidence of seeking work and having a genuine chance of being engaged'. If such obligations are greater than those imposed on British nationals who are registered job seekers and lead to disadvantages such as reduced access to benefits, this would be incompatible with Article 7(3)(b) of the Directive. In respect of those who have worked less than a year and Article 7(3)(c) of the Directive, the same point would apply in relation to the new requirement to show evidence of seeking work and having a genuine chance of being engaged.

The amendments also enable the United Kingdom to partly implement Article 10 of the Directive which requires family members of Union citizens in possession of a valid residence card (irrespective of where it was issued) to be exempt from the requirement to obtain a further visa. The United Kingdom had previously not applied this exemption to the third country nationals holding a resi-

<sup>65</sup> Immigration (European Economic Area) (Amendment) (No. 2) Regulations SI 2012/2560.

<sup>66</sup> *Rahman and others* C-83-11.

<sup>67</sup> Regulation 26(2A) Immigration (EEA) Regulations 2006, as amended.

<sup>68</sup> Article 25(2) Directive 2004/38.

dence card from any Member State. The restriction has been lifted on Germany and Estonia based apparently on the procedures of these countries as established in a survey of Member States' practices on residence cards carried out by the Secretary of State when defending a judicial review on this question.<sup>69</sup> The Secretary of State had not disputed that the 2006 Regulations did not fully implement the Directive but argued that non-implementation was justified by Article 1 of the Frontiers Protocol and as a necessary measure under Article 35 of the Directive.<sup>70</sup> The arguments were that there were no uniform format for residence cards, no minimum security features, they were not in English, they were susceptible to forgery and they could be confused with other types of residence permits. One has to presume that the partial removal of the restriction is an attempt to dissuade the Commission from further pursuing infringement proceedings which had been instigated against the United Kingdom.<sup>71</sup>

Three further amendments deal with the perceived abuse of rights: firstly, there are provisions which enable the Secretary of State to call applicants for interview and provide that non attendance can be taken into consideration at the time of making a decision (although it should not be the sole factor).<sup>72</sup> Secondly, it provides for a prohibition

on people returning to the United Kingdom if they have been removed from the UK during the previous twelve months for not having the right to reside and they cannot demonstrate that they have a right to reside beyond the three months usually allowed on entry, a provision whose compliance with EU law is doubtful.

Thirdly, the Secretary of State has circumscribed the effects of *Surinder Singh* in the Regulations by imposing three conditions for the exercise of *Surinder Singh* rights. Firstly, the British citizen must have been a worker or self-employed in the host Member State. This has already been declared incorrect in the case of *O&B* which states clearly that the right to take home one's family members applies to all categories of EU citizens, not just workers or the self employed.<sup>73</sup> Secondly, the amended Regulations state that the British citizen must be living with his or her family members in the host Member State or have been living together before the British citizen returns to the UK. This again appears to be in contradiction to established case law which has consistently stated that families do not have to live together.<sup>74</sup> Thirdly, the Regulations require a British citizen to have 'transferred the centre of his or her life'<sup>75</sup> to another member state in order to acquire a right of residence for a non-EEA family member in the United Kingdom upon their return. Relevant factors include the period of residence in the member state, the location of the person's principal residence and the degree of integration. The Explanatory Note to the amending regulations goes on to state: 'These changes are to ensure that a British citizen engages in a genuine and effective use of the rights conferred by Directive 2004/38/EC before a right to reside in the United Kingdom is conferred on a non-EEA family mem-

<sup>69</sup> *McCarthy, Rodriguez and Rodriguez v SSHD* [2012]EWHC 3368 (Admin).

<sup>70</sup> Paragraph 62(2) *ibid*.

<sup>71</sup> Free movement: Commission asks the UK to uphold EU citizens' rights, European Commission press release, IP12/417. For further discussion on this question, see the Advocate General's opinion in *McCarthy and others v SSHD* C-202/13. According to Advocate General Szpunar, a Member State may not make a third-country national's right of entry subject to the prior obtaining of a visa, when he already holds a 'Residence card of a family member of a Union citizen' issued by another Member State

<sup>72</sup> Regulation 20B, The Immigration (EEA) Regulations 2006, as amended; Explanatory Memorandum for SI 2013/3032.

<sup>73</sup> C-456/12, 12 March 2014.

<sup>74</sup> *Diatta v Land Berlin* C-267/83.

<sup>75</sup> Regulation 9, The Immigration (EEA) Regulations 2006, as amended.

ber.’ The *O&B* case appears to allow for a genuineness test.<sup>76</sup> However, exercising a Treaty right, i.e. working, being self employed, being self sufficient or being a student, for over three months would arguably be enough to show genuine residence. It remains to be seen whether the test, which is now binding, will be interpreted in a manner consistent with the case law of the Court of Justice.

### 3.3. Access to welfare

The habitual residence test has already been mentioned; most welfare benefits require claimants to be both habitually resident in the UK and to have the right to live in the UK, a condition that is met more easily by British citizens than by Union citizens, leading to infringement proceedings by the Commission. Some recent changes have been put in place to reduce further the ability of Union citizens to access welfare benefits in the UK and further changes are planned.<sup>77</sup> It is likely that the compatibility of these with EU law will be contested.

To tie in with the more restrictive definition of worker discussed above, from 1 January 2014, claimants must have been living in the UK for more than three months before they can claim income based jobseeker’s allowance as they will not be deemed to be habitually resident before that time.<sup>78</sup> EU citizen jobseekers, even if former workers, will have to show that they have a ‘genuine prospect of finding work’ to continue to receive job seekers allowance, housing bene-

fit, child benefit and child tax credit after six months. This is consistent with the new definition of worker discussed above and will come into effect on 1 July 2014.<sup>79</sup> More generally, the habitual residence test is also to be applied more rigorously although the test itself has not changed, so legislation was not considered necessary. Migrants will be expected to answer ‘... more individually-tailored questions, provide more detailed answers and submit more evidence before they will be allowed to make a claim. For the first time, migrants will be quizzed about what efforts they have made to find work before coming to the UK and whether their English language skills will be a barrier to them finding employment.’<sup>80</sup> Additionally, EU citizen jobseekers are no longer entitled to housing benefit even if they are in receipt of jobseeker’s allowance.

Further restrictions are planned. From 1 July 2014, new jobseekers arriving in the United Kingdom will have to wait three months before being able to claim child benefit and child tax credit and the DWP has announced that during 2014, the government plans to introduce a minimum earnings threshold to establish whether a migrant is or was in ‘genuine and effective’ work. EU migrants will have to show that for the last three months, they have been earning at the level at which employees start paying national insurance: £153 or 24 hours a week at national minimum wage. The press release goes on to state that: ‘An EEA migrant who has some earnings but doesn’t satisfy the minimum earnings threshold, will be

<sup>76</sup> *O & B v Minister voor Immigratie, Integratie en Asiel* C-456/12 [51].

<sup>77</sup> See *Financial Times*, 27 November 2013 in which David Cameron announced a raft of measures ‘to ensure our welfare system is not taken advantage of’. For a more detailed analysis of the changes, see *Measures to limit migrants’ access to benefits*, SN/SP/6889.

<sup>78</sup> Jobseeker’s Allowance (Habitual Residence) Amendment Regulations 2013 (SI 2013/3196).

<sup>79</sup> *Measures to limit migrants’ access to benefits*, SN/SP/6889, p13.

<sup>80</sup> Department for Work and Pensions press release, *Improved benefit test for migrants launched*, 13 December 2013. Note also that the routine use of interpretation services for most new jobseeker allowance claimants ended on 9 April 2014 and since 28 April 2014, claimants on jobseekers allowance whose spoken English is considered a barrier to them finding work have to undertake training to improve their language skills.

assessed against a broader range of criteria to decide whether they should still be considered as a worker, or self employed.<sup>81</sup>

### 3.4. The role of guidance

Guidance for caseworkers at the Home Office in the United Kingdom can be found in the European Casework Instructions and in the so-called Modernised Guidance.<sup>82</sup> Entry clearance officers who decide applications abroad rely on the chapters dealing with European free movement law in the Entry Clearance Guidance.<sup>83</sup> In principle, these give a good indication of how the Home Office expects its caseworkers to interpret the law. However, guidance does not have the force of law and if there is a conflict, the law should prevail. The guidance is also significantly out of date in terms of reflecting the amendments to the Regulations discussed above and the most recent case law. Applicants who want to understand how the Home Office approaches European applications are likely to find that it is of limited assistance.

Although the process of updating the guidance and moving them into a uniform format in the Modernised Guidance is ongoing, it is an extremely slow process which has not been prioritised. The first move across of a chapter of the European casework instruc-

tions to the Modernised Guidance occurred on 22 July 2013 (notably it was the chapter on the exclusion of European nationals from the United Kingdom). The only other chapters out of thirteen which have been transferred are those setting out a basic introduction of free movement rights and the chapter on family permits.

In addition to the published guidance, two Freedom of Information requests made by the Immigration Law Practitioners' Association in August 2012 and April 2013, unearthed unpublished policy notes known as European Operational Policy Notices which are brief notes of one or two pages, often written in response to new cases as guidance for caseworkers.<sup>84</sup> These included guidance on topics such as *Zambrano* and assessing the genuineness of marriages and are in essence the most up to date and useful instruments to determine how caseworkers will deal with a case. They are also, in reality, unavailable to most applicants.

## 4. THE ADMINISTRATION OF EEA APPLICATIONS

### 4.1. Applications from outside the United Kingdom

European applications are made from outside the United Kingdom for third country nationals to travel to the United Kingdom or from within the United Kingdom if the applicant is already here. Surprisingly, the systems favour those who apply from outside, as their applications for so called six month family permits are prioritised ahead of applications to enter the United Kingdom under domestic immigration law. There is also no

<sup>81</sup> Department for Work and Pensions press release, *Minimum earnings threshold for EEA migrants introduced*, 21 February 2014.

<sup>82</sup> The European Casework Instructions can be found here: <https://www.gov.uk/government/publications/european-casework-instructions>. The Home Office is moving towards compiling all its guidance in a new document called Modernised Guidance. The Modernised Guidance can be found here: <https://www.gov.uk/government/collections/eea-swiss-nationals-and-ec-association-agreements-modernised-guidance>.

<sup>83</sup> The entry clearance guidance relevant to EU applications can be found at: <https://www.gov.uk/government/collections/european-nationals-and-schemes-entry-clearance-guidance>.

<sup>84</sup> <http://www.ilpa.org.uk/resource/15191/ilpa-to-uk-border-agency-of-17-august-2012-re-freedom-of-information-request-european-operational-pdf> and [https://www.whatdotheyknow.com/request/new\\_european\\_operational\\_policy#incoming-389475](https://www.whatdotheyknow.com/request/new_european_operational_policy#incoming-389475)

fee payable, unlike applications made from within the United Kingdom which, as discussed above, are now charged for.

Procedurally, the process follows that of domestic applications. The forms and guidance are therefore geared towards a very detailed request for information and frequently ask questions which go beyond those that are of relevance to a European family member application. Examples of requests include information relating to the genuineness of marriages and to criminal convictions.<sup>85</sup> This, in turn, leads to some unjustifiable refusals with decisions at times showing a lack of understanding of the differences between domestic and European law. Biometric data is collected for all applications made abroad.

## 4.2. Applications from within the United Kingdom

European free movement applications from within the United Kingdom are dealt with by a dedicated department in UK Visas and Immigration. The usual applicant is a TCN who needs documentation to show that he or she can reside and work in the United Kingdom.

Unless the applicant is an Union citizen (which is rare as, in practice, Union citizens do not need to hold a registration certificate in the United Kingdom) the application must be made by post. There is no provision for a same day service or a priority service although this is available for most straightforward domestic law applications (admittedly for a large fee).

<sup>85</sup> See correspondence between ILPA and Eddy Montgomery, Director of Operations, UK Border Agency of 12 May 2010 re application forms and processing applications made under European Law.

### 4.2.1. Forms

The current form for a Union citizen family member applying from within the United Kingdom is 37 pages long.<sup>86</sup> Although not compulsory, the Home Office strongly encourages applicants to complete them. It not only asks for all the information that may be required under European law but also for more far reaching information, such as about ties to the applicant's country of birth, in or to any country where he has lived for more than five years. If the applicant is a student or self sufficient, he will be asked for details of his comprehensive sickness insurance.

There is also a request to disclose criminal records which initially seemed obligatory but has now been prefaced with the caveat: *Please provide details as requested below of any criminal convictions you may have both in the UK and overseas. However, please note that should you fail to provide this information this will not result in the rejection of your application.* Quite clearly, the expectation is that this section will be completed and it is unclear how the matter would be dealt with if the section were left blank. There is no provision under European law authorising this request. If a member state considers it essential to ascertain whether a Union citizen or family member is a danger to public policy or public security, the host member state should request the information from the state of origin of the applicant.

### 4.2.2. Delay

Once the application has been submitted, the applicant should be immediately sent a certificate of application which, if he is a family member, should entitle him to work. This is not the case if he falls within the definition

<sup>86</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/300572/EEA\\_2\\_Residence\\_Card\\_04-14.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/300572/EEA_2_Residence_Card_04-14.pdf).



of other family members, (or as they are known in the United Kingdom, extended family members) as the Home Office does not accept that their rights are directly effective. Often these letters take about four weeks to send out and recently, there have been reports about backlogs with just opening the post that the European Directorate in the Home Office receives.

Once submitted, applications regularly take longer to be decided than the six month deadline imposed by Directive 2004/38. Although straightforward applications are now dealt with in about two to three months, anything which is not a straightforward family residence card application routinely takes longer. In a letter sent in August 2010 to the Immigration Law Practitioners' Association, the UK Border Agency stated that only 78.96% of cases were being dealt with within six months. In the past applications appeared to be pulled out after about five months wait at the Home Office and the applicant would be asked for further, usually updating information. One can only assume that this was to give the impression that matters were being dealt with within the absolute deadline.

This delay causes serious problems for the Union citizen and family members. They are unable to travel as their passports are with the Home Office, are unable to prove their right to reside or work and often cannot access public services or benefits to which they may be entitled. Sanctions on employers who employ migrants who do not have the right to work mean that family members often have difficulty getting and retaining work, particularly before they have been able to secure a certificate of application. Although the Home Office maintains an employers' hotline which enables employers to check the immigration status of a particular employee with the Home Office, the information provided is often not up to date or accurate.

These delays also mean that people cannot follow what should be the normal procedure

of applying for a family permit and then for a residence card. To circumvent the delays facing applications made within the United Kingdom, applicants frequently apply for family permits from abroad instead of travelling to the United Kingdom and applying for a five year residence card.

It is concerning that there appears to be no culture within the Home Office of dealing with these applications in a timely way, as happens with applications under national law. In fact, the Home Office sees the six months as a deadline to which it needs to work towards rather than as an absolute maximum. Such practice is, of course, in contradiction with Article 10 of the Directive, which requires a Residence Card to be issued no later than six months from the date on which they submit the application and a certificate of application for the residence card to be issued immediately. Systems have been put in place to try to deal with the delay. One such system was the so-called «pre-sift» which has been abandoned. The Home Office contended that many applications that were submitted did not have the required documentation. They therefore instituted a system whereby enclosures were initially checked and the application was not logged at the Home Office but returned to the applicant if the Home Office did not believe that they were complete. The concern was that if anything was at all out of the ordinary or a document was missing even for a good reason, this was dealt with by returning the application so that the clock did not start on the six month period.

#### *4.2.3. Comprehensive sickness insurance*

An area of dispute which was raised in the infringement proceedings started by the Commission in April 2012, and which remains unresolved, is the requirement for Union citizens who live in the United King-

dom on the basis of being self-sufficient to obtain sickness insurance. The United Kingdom does not consider entitlement to treatment by the National Health Service, the public healthcare scheme as sufficient. This often has repercussions for those who try to obtain permanent residence and retrospectively have to show that they had some form of private health insurance throughout their period of residence under the Directive.

#### 4.2.4. *Sham marriages*

As mentioned earlier, possible sham marriages are a major policy concern. The 2006 Regulations exclude anybody who has entered a marriage or civil partnership of convenience from the definition of spouse or civil partner.<sup>87</sup> Over the last five years there has been an increased emphasis by the Home Office on tackling this method of abuse as concerns have been voiced both in Parliament and in the media.<sup>88</sup> Generic guidance to immigration officers and entry clearance posts makes it clear that abuse should be considered in all applications. In the European context, a policy guidance note entitled 'Suspected marriages/civil partnerships of convenience' advises caseworkers how they should assess whether there is a marriage or civil partnership of convenience.<sup>89</sup> The guidance acknowledges that the burden of proving that a marriage is one of convenience rests with the Home Office and that the standard of proof is that it must be '*more likely than not*' to be a marriage of convenience. The note goes on to set out possible indicators

that a marriage or civil partnership is genuine. These include co-habitation; if not living together, daily contact; sharing parental responsibility; sharing financial responsibilities; having visited each other's home country and having met each other's family members etc. It then goes on to list factors which may indicate a marriage or civil partnership of convenience, namely statements by relevant parties to this effect; evidence from investigations being undertaken by relevant authorities; discrepancies in the information provided or inaccuracies in any accounts given about the marriage or civil partnership. If a caseworker does suspect a sham marriage, they can send out a questionnaire. They can also request that the couple attend an interview, a power that is increasingly used.

Unfortunately, the quality of decisions where marriages of convenience have been alleged has been very poor. One problem is that, in conformity with the government's obligations under the Directive, the application form for a family permit does not ask for evidence that the relationship is genuine but applicants who do not spontaneously provide such evidence may have their applications refused. So for example, despite the fact that the civil partnership certificate of an Irish national and his civil partner was submitted and no further questions were asked by the Home Office, the Home Office refused the application stating that they were not satisfied that the civil partnership was genuine and subsisting, a phrase borrowed from domestic immigration control. As the applicant had not submitted his divorce certificate which had never been requested, it was queried whether he was free to enter into a civil partnership and it was also stated that, given the different cultural backgrounds of the two individuals, they believed that it was a civil partnership of convenience.<sup>90</sup> The con-

<sup>87</sup> Regulation 2 of the Immigration (European Economic Area) Regulations 2006.

<sup>88</sup> See for example *Documents considered by the Committee on 22 January 2014 – European Scrutiny Committee*.

<sup>89</sup> Suspected marriages/civil partnerships of convenience, dated 12 September 2012, issue number 15/2012, obtained by ILPA after a freedom of information request.

<sup>90</sup> The decision was overturned by the First Tier Tribunal on appeal.

cern is that the Home Office believe that the burden of proof is on the applicant to show that he or she is in a genuine marriage rather than the Home Office to prove the sham marriage. The approach has been criticised judicially but administrative practice still seems to be lagging.<sup>91</sup>

There is an obligation in the Immigration and Asylum Act 1999, s.24 on marriage registrars to inform the Home Office if they suspect a sham marriage or civil partnership is about to take place and this is clearly used as the number of reports has been increasing.<sup>92</sup> Given the media attention around EU immigration and the relative ease with which documents can be obtained for third country nationals after a marriage to a Union citizen compared to marriage to a British national, the Home Office clearly sees this as an area of abuse or potential abuse. As discussed earlier, the Immigration Act 2014 contains new powers to investigate and prevent suspected sham marriages before they take place.

#### 4.2.5. *Permanent residence*

Many applicants face their first real difficulties with the Home Office when they make an application for permanent residence. The Home Office requires very thorough documentation showing the continuous exercise of Treaty rights for five years by the Union citizen. Periods of unemployment or failure to register with a job centre often cause problems in showing continuity of residence. If a family member wants to rely on the self sufficiency of the Union citizen, proof of comprehensive sickness insurance is required.

<sup>91</sup> *Papajorgi* (EEA spouse – marriage of convenience) Greece [2012]UKUT 00038 (IAC).

<sup>92</sup> Table 5. 4.1 Marriages of convenience in *Documents considered by the Committee on 22 January 2014 – European Scrutiny Committee*: in 2008, there were 344 reports of sham marriages made by registrars, in 2012, 1,891 were reported.

TCNs who have retained rights after a divorce or those who are separated from their spouse or civil partner often have particular problems proving that they have five years continuous residence under the Directive as they are reliant on their former partners for at least part of this information. There is often a narrow view taken of evidence rather than a sensible ‘in the round’ approach. Despite the fact that the Home Office as a government body is in the position of being able to make obtain information about tax payments from the Inland Revenue to aid an applicant, it is a power they use very sparingly, usually only when there has been domestic violence.

Those exercising derivative rights (outside Directive 2004/38) are not considered entitled to permanent residence. This was upheld by the Tribunal in *Bee* in respect of a parent who was asserting a right under *Chen*.<sup>93</sup>

## 5. DOMESTIC JURISPRUDENCE

The UK’s courts have engaged in many aspects of EU free movement rights and a good proportion of important CJEU jurisprudence (*Surinder Singh*, *Baumbast*, *Chen*, *Carpenter*, *McCarthy*, *Teixeira* and *Ibrahim*, *Lassal*, *Rahman*, *Alarape*) originated in the UK. As this list suggests, the position of TCN family members has been a major issue alongside access to services and welfare, which often encompass the definitional issue of whether an individual has the right to reside under the Directive.

As mentioned above, if an application to be recognised as a Union citizen exercising free movement rights or a family member is refused, the initial appeal is to the Immigration and Asylum Chamber of the First-tier Tribunal. A further appeal lies to the Upper

<sup>93</sup> *Bee* (permanent/derived rights of residence) [2013] UKUT 00083.

Tribunal, still within the Immigration and Asylum Chamber. Appeals on welfare entitlements are heard in the Social Security Chamber of the First-tier Tribunal and in the Administrative Chamber of the Upper Tribunal. An appeal on a point of law may then be taken from the Upper Chamber to the Court of Appeal and from there, in cases of public or constitutional importance, to the Supreme Court. Until 2009, the Supreme Court was known as the Appellate Committee of the House of Lords (or just House of Lords); in this article, unless the context requires otherwise, references to the Supreme Court include the House of Lords. In practice, it is unusual for a case to proceed beyond the Upper Tribunal. Very occasionally, claims may be brought by judicial review in the Administrative Court (a division of the High Court) but where, as here, appeal rights are available, judicial review is not possible.

The United Kingdom has three different legal jurisdictions (England and Wales, Scotland, and Northern Ireland; Jersey and the other Channel Islands are not part of the UK). The Tribunal hears immigration and social security appeals in all three. At the higher appeal level, there are separate courts of appeal (the England and Wales Court of Appeal, the Court of Appeal in Northern Ireland and the Scottish Court of Session). The Supreme Court hears further appeals from all three courts. While there are a substantial number of Court of Appeal cases on the Directive, only a very few cases have reached the Supreme Court, even taking into account that the Court hears fewer than 100 cases per year. It may be that lower courts refer difficult questions of EU law directly to the EU Court of Justice via an article 276 reference before they reach the Supreme Court.

All three systems use common law although there is a mixed common/civil law system in Scotland. This is significant in two main ways. Firstly, the doctrine of precedent means that courts are bound by the legal principles established in higher courts and,

usually, by courts on the same level as themselves when hearing similar fact cases. While EU law is the superior source of law within the UK, the Tribunal must follow the Supreme Court's and Court of Appeal's interpretations of what that law requires. Some key decisions of the Upper Tribunal are also binding on both that Tribunal and the First-tier Tribunal. Judges are therefore constrained in how far they may adopt new interpretations of EU law. Secondly, the UK has a tradition of detailed legislative drafting and literal statutory interpretation and it has not always been easy for the UK's courts to adjust to the teleological interpretation which EU law requires. This is particularly so when decisions are made in the Tribunal which, as already mentioned, looks at these decisions in an immigration context and often focuses on implementing legislation rather than the Directive.

This section will consider the major domestic jurisprudence thematically. Given the large numbers of decisions, this section will focus on some selected issues and on the most important higher court (Supreme Court and Court of Appeal) judgments and will only include Tribunal decisions where these are recent and deal with issues that have not yet come before the higher courts. It is noticeable that cases cluster in those areas where there is a lack of clarity or certainty in the jurisprudence and particularly in cases involving TCN family members and/or access to welfare. Some areas which generated many decisions in the past seem now to have been largely resolved. For example, there are few recent cases on *Metock*. There is still however considerable activity surrounding the principle in the earlier case of *Chen*. Other major issues in recent years have concerned derived rights after *Teixeira* and *Ibrahim*, *Chen* and *Zambrano*, retained rights, permanent residence and other family members. Although cases started to be brought after transposition in 2006 (and a few cases based on older legislation and jurisprudence preceded the

Directive), there has been a large increase in the courts' involvement since 2010.

### 5.1. Inclusion within the Directive

A preliminary question is whether the Union citizen in question comes within the Directive i.e. is a worker, self-employed, student or self-sufficient EU citizen. The meaning of 'worker' for the purposes of the Directive has generated the most claims and most commonly arises in the context of a claim for welfare support made because work has ended. In determining the answer, the higher courts have often immersed themselves in the Directive and the Court of Justice jurisprudence. For example, in *Barry*, the claimant was a Dutch national who had worked for only two weeks in a six month period (as a steward at the Wimbledon tennis tournament, a post that could only ever be temporary).<sup>94</sup> The court engaged in depth with the European jurisprudence to find that Mr Barry's work, although of short duration, made him a worker within the meaning of Community law. The courts also took a purposive view in *Elmi*, recalling that the Directive was intended «to simplify and strengthen» the right of free movement.<sup>95</sup> In that context, the failure of the government to monitor the job-seeking activity of a parent in receipt of income support who had declared herself to be looking for work could not be used to argue that she was no longer a work-seeker under the Directive.

Even or maybe particularly where the decision goes against the claimant, the courts engage very actively with the meaning of the Directive, not the implementing regulations, in the context of EU law as a whole. In *Tilianu*, Sedley LJ considered the wording of the Directive in three other languages (Ger-

man, French and Spanish), earlier EU legislation and the overall context of the Directive to conclude that articles 7(3)(b) and (c) do not apply to the self-employed.<sup>96</sup> It is not always easy however for a court to reach its own conclusions. *Samin* turned on the meaning of «temporarily unable to work» under article 7(3) of the Directive, a term that is not defined in the Directive and which has not been directly discussed in the Court of Justice jurisprudence.<sup>97</sup> The Court of Appeal was bound by two of its own previous decisions, which had found that the test is whether there is a 'realistic prospect' of a return to work.<sup>98</sup> The Court agreed with its own previous findings, concluding that they were justified by the Directive, but, given the doctrine of precedent, they had little choice but to do so. However, there seems to have been enough doubt as to whether this is the correct test for permission to be granted for a Supreme Court hearing.

The only Supreme Court case heard in this area, *St Prix v Secretary of State for Work and Pensions*, resulted in an article 276 reference.<sup>99</sup> It concerned a woman who was a worker under the Directive but who temporarily left the labour market due to pregnancy. The question was whether she remained a worker under article 7 of the Directive even though she was neither under a contract of employment nor looking for work. The answer, while not explicitly given by the Directive, might seem too obvious to merit a referral given the objectives of the Directive and the clear discrimination involved in refusing welfare support in such a case. The situation is different to that in

<sup>94</sup> *Barry v Southwark LBC* [2008] EWCA Civ 1440.

<sup>95</sup> *Elmi v Secretary of State for Work and Pensions* [2011] EWCA Civ 1403 [22].

<sup>96</sup> *R. (on the application of Tilianu) v Social Fund Inspector* [2010] EWCA Civ 1397.

<sup>97</sup> *Samin v Westminster City Council* [2012] EWCA Civ 1468

<sup>98</sup> *De Brito v Secretary of State for the Home Department* [2012] EWCA Civ 709; *Konodyba v Royal Borough of Kensington and Chelsea* [2012] EWCA Civ 982.

<sup>99</sup> *St Prix v Secretary of State for Work and Pensions* [2012] UKSC 49.



*Dias*, discussed below, which concerned voluntary absence from the labour market to care for children, a choice that may be made by either parent.<sup>100</sup> Indeed, the Court seemed to be in little doubt of the merits but was nonetheless reluctant to act to expand the scope of the Directive where this has consequences for the public purse. In any event, the Advocate General's opinion on the case is unequivocal. A woman remains a worker when she is absent from the labour market due to pregnancy and childbirth until such time as it is reasonable for her to return to or to seek work, a period that must not be shorter than that granted to citizen women in the same situation.<sup>101</sup> Consistent with *Dias* and the opinion in *Saint Prix*, the Upper Tribunal has found that, while a woman who leaves the job market to look after children is no longer a worker, that status may revive if she starts looking for work.<sup>102</sup>

The analysis however is sometimes more superficial. In *FK (Kenya) v SSHD*, for example, a claim was made for permanent residence based on dependency on a Swiss citizen who claimed to be self-sufficient.<sup>103</sup> However, she was found not to have been self-sufficient as she did not have comprehensive medical insurance throughout her stay. The issue was disposed off briefly, without considering the *Baumbast* decision and related issues of discrimination and proportionality (although this may have been because they were not argued before the court). The judgment is a good example of a case being seen through an immigration rather than EU lens. It was an appeal on combined EU and article 8 grounds made in anticipation of a likely deportation to Kenya due to the appellant's offending.

The question of health insurance received more detailed consideration in *Lekpo-Bozua* where a student had lived in the UK for some years with her aunt without medical insurance.<sup>104</sup> The case was distinguished from the position in *Baumbast* because here the appellant had been explicitly excluded by the terms of the Directive whereas, in *Baumbast*, the claim had been based on the Treaty; the question of whether access to NHS care can be treated as equivalent to private health insurance was not considered.<sup>105</sup> Generally, and particularly in the Tribunal, absence of health insurance is regarded as fatal to a claim to be self-sufficient.<sup>106</sup> In the Court of Appeal, Sedley LJ has questioned whether the requirement can be met through access to NHS care but this has not been taken up more widely.<sup>107</sup> The EU Commission also seems to be of the view that NHS care meets the requirement for comprehensive sickness insurance and issued a reasoned opinion on the issue in April 2012.<sup>108</sup>

## 5.2. Right to reside

The application of the right to reside test is closely linked to the Directive as the right may be established through work, self-employment, self-sufficiency or study under the Directive. As both self-sufficiency and study are subject to resources and sickness insurance criteria, applicants can find themselves in a catch-22: they can only make a claim if they are Union citizens exercising their free movement rights but the fact of making a claim shows that they are not exer-

<sup>100</sup> *Secretary of State for Work and Pensions v Dias* [2009] EWCA Civ 807.

<sup>101</sup> Case C-507/12 *Jessy Saint Prix v Secretary of State for Work and Pensions*, Opinion of Advocate General Wahl delivered on 12 December 2013.

<sup>102</sup> *Shabani (EEA - jobseekers; nursery education)* [2013] UKUT 315 (IAC).

<sup>103</sup> *FK (Kenya) v SSHD* [2010] EWCA Civ 1302.

<sup>104</sup> *Lekpo-Bozua v Hackney LBC* [2010] EWCA Civ 909

<sup>105</sup> *Baumbast v SSHD* C-413/99.

<sup>106</sup> See, for example, *Zubair (EEA regs: self-employed persons)* [2013] UKUT 196(IAC)

<sup>107</sup> *W(China) v SSHD* [2006] EWCA Civ 1494 [26]

<sup>108</sup> European Commission Press release *Free movement: Commission asks the UK to uphold EU citizens' rights* 26<sup>th</sup> April 2012.

cising their rights in the manner required by the Directive. The Court of Justice has found that a claim for assistance may indicate that the conditions for self-sufficiency have not been met but emphasised the need for an individualised approach to these cases.<sup>109</sup>

The right to reside test was introduced in 2004 and so predates the Directive. The relevant case law often arises from events before the Directive was implemented but decided afterwards. In *Abdirahman*, the Court of Appeal found that the test did not breach EU law (in its pre-Directive form) and that its discriminatory character was justified.<sup>110</sup> It rejected an argument similar to that eventually adopted by the Court of Justice (see the discussion above) that an individualised decision must be made about whether rights are still being exercised. The right to reside test was also upheld by the Court of Appeal in *Kaczmarek v Secretary of State for Work and Pensions*,<sup>111</sup> which saw it as consistent with the Treaty and justified it by citing a passage from the Court of Justice case of *Trojani*:

*So long as social security systems have not been harmonised in terms of the level of benefits, there remains a risk of social tourism, ie moving to a Member State with a more congenial social security environment.*<sup>112</sup>

The most important decision, *Patmalniece*, also arose outside the Directive and concerned eligibility for a pension credit that had a right to reside requirement.<sup>113</sup> The main issue was not whether the appellant had a right to

reside as it was accepted that she did not but whether the right to reside criterion is discriminatory on the grounds of nationality. The Supreme Court found that the condition discriminates indirectly but that it is justified. Clearly, the European Commission disagrees (see the discussion above).

Workers who are subject to transitional measures will only be regarded as having the right to reside if they comply with the requirements of that regime (which must, however, be proportionate). *Zalewska* found that a Polish worker who had failed to register her employment, as required by the transitional arrangements, was not entitled to income support.<sup>114</sup> Similarly, late registration does not have retrospective effect.<sup>115</sup> Transitional arrangements interact with national immigration laws as they do not apply to those who had been working lawfully for 12 months or longer at the time of accession. However, an asylum seeker permitted to work while on temporary admission (tolerated presence) and an overstayer not expressly prohibited from working could not take advantage of the derogation.<sup>116</sup>

### 5.3. Marriage of Convenience

As reported elsewhere in this article, the marriage of convenience has become a major preoccupation. The Upper Tribunal in *Papajorgi* found that the officials cannot routinely require applicants to show that their marriage is genuine but only to do so if evidence is present to suggest that this is not the case.<sup>117</sup> The protections in articles 27 and 28 do not

<sup>109</sup> See, for example, *Pensionsversicherungsanstalt v Peter Brey*, C- 140/12.

<sup>110</sup> *Abdirahman v Secretary of State for Work and Pensions* [2007] EWCA Civ 657.

<sup>111</sup> *Kaczmarek v Secretary of State for Work and Pensions* [2008] EWCA Civ 1310.

<sup>112</sup> *Trojani v Centre Public d'aide sociale de Bruxelles* (Case C-456/02) [2004] ECR I-7573 [18].

<sup>113</sup> *Patmalniece v Secretary of State for Work and Pensions* [2011] UKSC 11.

<sup>114</sup> *Zalewska (AP) v Department for Social Development (Northern Ireland)* [2008] UKHL 67.

<sup>115</sup> *Szpak v Secretary of State for Work and Pensions* [2013] EWCA Civ 46.

<sup>116</sup> *Miskovic v Secretary of State for Work and Pensions* [2011] EWCA Civ 16.

<sup>117</sup> *Papajorgi (EEA spouse – marriage of convenience) Greece* [2012] UKUT 00038 (IAC).

apply to a decision to withdraw a residence document on the grounds that it was obtained through an abuse of rights under article 35 (a marriage of convenience).<sup>118</sup>

#### 5.4. Permanent residence

An innovation of the Directive was the right to permanent residence if the EU citizen and their family members who live with him or her who have «resided lawfully» for five years in the member state.<sup>119</sup> The meaning of «resided lawfully» and other aspects of the right to permanent residence have been the subject of significant litigation, although some clarification has now been provided by the Court of Justice in a series of references mainly from the UK.<sup>120</sup>

The recent Court of Justice decision in *Onuekwere* has settled the question of whether time spent in prison counts towards permanent residence, confirming the view in *C v SSHD* that it does not.<sup>121</sup> However, it did not address all issues and some of the findings of the Upper Tribunal in *Essa* remain relevant, notably that periods of wrongful detention, pre-trial remand (leading to acquittal or non-custodial sentence), or immigration detention may count.<sup>122</sup> If there have been periods of absence, they must be for reasons comparable in importance to those in article 16(3) of the Directive; however, that list is not exhaustive.<sup>123</sup>

More often, the question has arisen in relation to access to welfare. Two of the earliest cases, *Lassal* and *Dias* led to article 276 referrals.<sup>124</sup> They concerned Union citizens from France and Portugal respectively, both of whom claimed income support. The issue in *Lassal* was whether a period of five years that was completed before the date of transposition gave a right to permanent residence. *Dias* concerned a Portuguese national who, over the course of many years residence in the UK, had stopped work at various moments to care for her children, thus interrupting the accumulation of five years' continuous residence as a worker. It asked whether time spent not working or self-sufficient but in possession of a residence permit before transposition of the Directive counted towards the five years needed for permanent residence under the Directive or, if not, if there was a right to permanent residence arising from art 18 TFEU. Even before guidance from the Court of Justice in these cases and also in *Alarape* was available however,<sup>125</sup> the Court of Appeal found that 'residing legally' means residing in accordance with the terms of the Directive, as indicated in recital 17 of the preamble, dismissing claims based on article 18 TFEU.<sup>126</sup> This could have some hard outcomes; a bereaved father and children who had residence permits but could not comply with the conditions of article 12 of the Directive did not qualify for permanent residence.<sup>127</sup> This was especially harsh for the father who was not a Union citizen.

TCNs (from Nigeria) were the appellants also in *Amos*.<sup>128</sup> Here the issue was that, as

<sup>118</sup> *TC (Kenya) v Secretary of State for the Home Department* [2008] EWCA Civ 543.

<sup>119</sup> Article 16.

<sup>120</sup> *Secretary of State for Work and Pensions v Dias* C-325/09; *Ziolkowski v Land Berlin* C-424/10; *Alarape v SSHD* C-529/11; *Onuekwere v SSHD* C-378/12.

<sup>121</sup> *C v SSHD* [2010] EWCA Civ 1406.

<sup>122</sup> *Essa (EEA: rehabilitation/integration)* [2013] UKUT 00316 (IAC)

<sup>123</sup> *Babajanov (Continuity of residence - Immigration (EEA) Regulations 2006)* [2013] UKUT 513 (IAC).

<sup>124</sup> *Secretary of State for Work and Pensions v Lassal* [2009] EWCA Civ 157; *Secretary of State for Work and Pensions v Dias* [2009] EWCA Civ 807.

<sup>125</sup> *Alarape v SSHD* C-529/110.

<sup>126</sup> *McCarthy v SSHD* [2008] EWCA Civ 641; *Lekpo-Bozua v London Borough of Hackney* [2010] EWCA Civ 909.

<sup>127</sup> *Okafor v SSHD* [2011] EWCA Civ 499.

<sup>128</sup> *Amos v SSHD* [2011] EWCA Civ 552.

separated spouses, they were unable to establish that the Union citizen spouse had been exercising rights under the Directive after separation but before the divorce (it was acknowledged that there was no need to show exercise of rights after divorce). The Court of Appeal found that there was no obligation on the government, who would have access to the relevant records, to assist in this regard. It is interesting that, in this case involving TCNs, the Court made its decision by reference to the implementing regulations rather than the Directive (even though the original legal submissions had referred to the Directive).

This decision has not helped with the serious practical difficulties spouses may face after separation. However, the Upper Tribunal has found that government should not ask for evidence of work throughout the entire period of residence as status of worker may be retained without continuous work, and must be careful to stay within the law in terms of documentary requirements.<sup>129</sup> «Residing with» for the purposes of permanent residence also does not have to mean cohabitation (although see now the Court of Justice in *Onuekwere*).<sup>130</sup>

### 5.5. Other family members

There have been several cases on the meaning and entitlements of 'other family members' under article 3(2) of the Directive. They are controversial because 'other family members' includes TCN relatives who have few opportunities of being admitted under domestic law and because the Directive leaves some discretion to member states in deciding whether to admit. Some of these

issues have now been resolved by the Court of Justice judgment in *Rahman*.<sup>131</sup>

The issue of the timing and place of dependency was much contested. The pre-*Metock* case of *KG (Sri Lanka) v Secretary of State for the Home Department* [2008] EWCA Civ 13 established that 'the country from which [the applicants] have come' does not need to be an EEA state (as the implementing regulations then required) provided the parties were in the same state immediately prior to the move, thus excluding family members who entered the UK ahead of the Union citizen. The underlying immigration anxieties are clear in the judgment. Both the appellants were irregular migrants whose entry to the UK predated the movement of the Union citizen in question. Reference was made (twice) to the fourteen relatives in Sri Lanka who might follow if the claim succeeded (even though, on the facts, they were unlikely to have met either the dependency or household criterion of article 3(2)). There was a detailed exposition of the purpose of the Directive, which is to enable the movement of Union citizens, not family reunification except insofar as it facilitates that purpose.

The judgment in *Metock* came shortly afterwards but the Court of Appeal did not consider that it changed the position.<sup>132</sup> However, some adjustment was needed after *Rahman* was decided by the Court of Justice. The 2013 case of *Aladeselu* determined that, while the relative must have been dependent in the country from which they come, that is a reference to their own country of residence which need not be the same as that in which the Union citizen had resided. Further, provided there is still dependency at the date of the application, a relative who has been dependent throughout may still qualify if he arrives in the host Member State before the

<sup>129</sup> *Samsam (EEA: Revocation and retained rights) Syria* [2011] UKUT 00165 (IAC); *Barnett and others (EEA Regulations: rights and documentation)* [2012] UKUT 00142

<sup>130</sup> *PM (EEA – spouse – «residing with») Turkey* [2011] UKUT 89 (IAC); *Onuekwere v SSHD* Case C-378/12.

<sup>131</sup> *SSHD v Rahman* Case C-83/11.

<sup>132</sup> *Bigia v Entry Clearance Officer* [2009] EWCA Civ 79.

Union citizen.<sup>133</sup> However, the Court of Appeal has upheld the view that dependency must have existed in another state; dependency (or household membership) which arises only after entry to the UK does not fall within article 3(2).<sup>134</sup> This point is now the subject of infringement proceedings by the Commission.<sup>135</sup>

Dependency (or household membership) must relate only to the Union citizen themselves, not their spouse.<sup>136</sup> However, it does not need to be a dependency of necessity although mere presence without permission to work does not, on its own, establish dependency.<sup>137</sup> If a residence card has been issued in error, it may be revoked.<sup>138</sup>

## 5.6. Derived rights

*Chen* is another Court of Justice decision which had the potential to undermine national controls and anxiety about this may be detected in the domestic case law. The first case to be determined by the Court of Appeal after the decision, *W (China)*, decided before transposition of the Directive, mentions the illegality of the parents' entry both to the UK and Ireland (where their child was born) and their failed asylum claim in the opening paragraph.<sup>139</sup> However, in this case, there was an absence of sickness insurance and sufficient resources. The availability of free NHS care was not regarded as meeting that requirement so far as the parents were concerned. The court was unanimous in finding that the parents lacked resources because,

although they were working, this was unlawful; there was no obligation on the government to permit the parents to work in order to fulfil the *Chen* requirements. Permission to appeal to the House of Lords was refused. *Liu* also betrayed anxiety about the immigration implications of *Chen*. Buxton LJ said openly that, were it not for the obligation to comply with the judgment in *Chen*, he might regard the decision to give birth in Ireland solely in order to gain EU citizenship for the child as an abuse of rights.<sup>140</sup> In any event, the resources requirement was not fulfilled by parents working under temporary leave that would terminate upon the grant of a right of residence to the child. The terms of the judgment made it clear that the principle of *Chen* would only be applied when all the conditions of that case were met. The Tribunal later found that there was a right under EU law to enter the UK as well as to remain in order to fulfil *Chen* rights.<sup>141</sup> The *Zambrano* decision was a further blow and working was permitted from July 2012.

The *Zambrano* line of decisions does not concern the Directive but Article 20 of the Treaty but it is regarded as part of the panoply of free movement rights. The Court of Appeal in *Pryce* established that *Zambrano* created a directly effective right on people already living in the UK.<sup>142</sup> The Upper Tribunal found that the *Zambrano* principle could be relied upon by a parent or other primary carer living outside the EU in order to accompany the Union citizen child to their country of nationality.<sup>143</sup> The principle applies even if the child is not a UK national if the effect of the decision would be that child must leave the EU.<sup>144</sup> In the context of crimi-

<sup>133</sup> *Aladeselu v SSHD* [2013] EWCA Civ 144.

<sup>134</sup> *Oboh (Nigeria) v SSHD* [2013] EWCA Civ 1525.

<sup>135</sup> European Commission Press release *Free movement: Commission asks the UK to uphold EU citizens' rights* 26<sup>th</sup> April 2012.

<sup>136</sup> *Soares v SSHD* [2013] EWCA Civ 575.

<sup>137</sup> *Lim (EEA -dependency)* [2013] UKUT 437 (IAC); *Reyes (EEA Regs: dependency)* [2013] UKUT 314 (IAC).

<sup>138</sup> *Sannie v SSHD* [2013] EWCA Civ 1638.

<sup>139</sup> *W (China) v SSHD* [2006] EWCA Civ 1494.

<sup>140</sup> *Liu v SSHD* [2007] EWCA Civ 1275

<sup>141</sup> *M (Chen Parents: source of rights)* Ivory Coast [2010] UKUT 227 (IAC).

<sup>142</sup> *Pryce v Southwark LBC* [2012] EWCA Civ 1572.

<sup>143</sup> *MA and SM (Zambrano: EU children outside EU)* Iran [2013] UKUT 00380 (IAC).

<sup>144</sup> *Ahmed (Amos; Zambrano; reg 15A(3)(c) 2006 EEA Regs)* 2013: UKUT 00089 (IAC).



nal deportation, the Court of Appeal found that the principle applied only to situations in which the Union citizen would be forced to leave the EU so could not exercise their citizenship rights, not where the enjoyment of rights would be diminished by departure.<sup>145</sup>

A desire to ensure that the boundaries of derived rights are not wider than required by the Court of Justice jurisprudence is visible in a Court of Appeal case dealing with the impact of the *Ibrahim* and *Teixeira* decisions.<sup>146</sup> Again, while these are based not on the Directive but on Article 10 Regulation 492/2011 (formerly Article 12 Regulation 1612/68), they come under the umbrella of free movement rights. Here, the only period of employment between 1999 and 2010 was a part-time (8 hours per week) post held for 10 weeks. A period spent job-seeking was found not to count towards the status of worker for the purposes of Article 12 of the Regulation even if it might under the Directive. The Court of Appeal considered it arguable that, given the heavy obligations that the Regulation creates, the test of being a worker should be more demanding than under the Directive. However, that point had already been ceded by the government. Even so, the period of employment here was regarded as too minimal to engage rights whether under the Directive or the Regulation. Looking at the evidence as a whole, including only token efforts at job-seeking through the period, residence had not been for the purpose of exercising a right to work.

The boundaries of 'education' have also been explored in the domestic case law. While the Court of Justice has confirmed that, dependent on the facts, the derived right of residence might continue after a child enters higher education, the Upper Tribunal inclined to the view that there is no lower age limit but did not need to reach a view or make

a referral in order to determine the case before it.<sup>147</sup>

## 5.7. Exclusion of EU citizens

The final issue considered is deportation. This is another problematic area in which immigration concerns can easily intrude. As mentioned earlier in this article, the ability to deport foreign national prisoners has become a major political issue in the UK and the government has sought to maximise its power to deport despite human rights and EU norms. Despite this, the Court of Appeal has upheld the necessity of observing the Directive's requirements for an assessment of whether the individual's personal conduct represents a genuine, present and sufficiently serious threat as required by article 27(2) of the Directive.<sup>148</sup> The Court of Justice decision in *ZZ (France)* means that deportees in national security cases must be informed of the 'essence of the grounds' on which the decision had been made, a requirement that could not be yielded to national security concerns.<sup>149</sup> However, detention pending deportation is permitted provided it conforms to the requirements in the Directive although damages are payable for unlawful detention.<sup>150</sup>

The Court of Justice's decision in *MG* supports the domestic decision in *HR (Portugal)* which found that time spent in prison does not count for the purpose of enhancing the level of protection against expulsion under article 28 of the Directive.<sup>151</sup> However, the

<sup>147</sup> *Alarape v SSHD* C-529/11; *Shabani (EEA - job-seekers; nursery education)* [2013] UKUT 315 (IAC).

<sup>148</sup> *BF (Portugal) v Secretary of State for the Home Department* [2009] EWCA Civ 923.

<sup>149</sup> *ZZ (France) v SSHD* C-300/11; *ZZ (France) v SSHD* [2014] EWCA Civ 7.

<sup>150</sup> *R. (on the application of Nouazli) v SSHD* [2013] EWCA Civ 1608; *R. (on the application of MK (Algeria)) v SSHD* [2010] EWCA Civ 980.

<sup>151</sup> *SSHD v MG* C-400/12; *HR (Portugal) v SSHD* [2009] EWCA Civ 371.

<sup>145</sup> *Harrison v SSHD* [2012] EWCA Civ 1736.

<sup>146</sup> *MDB (Italy) v SSHD* [2012] EWCA Civ 1015.

enhanced protection conferred by ten years' residence prior to conviction is not automatically lost upon imprisonment although the prison sentence would be one factor in determining the degree of integration and thus whether the restrictive criteria for expulsion are met as at the date of decision. «Imperative grounds of public security» require a finding that the person concerned represents a «genuine and present threat to the fundamental interests of society or of the Member State concerned». Previous criminal convictions and «considerations of general prevention» cannot, without more, justify expulsion on these grounds.<sup>152</sup>

### 5.8. Discussion of domestic jurisprudence

The domestic case law shows serious engagement by the courts with the rights contained in the Directive as well as the derived rights that exist outside it. There are many examples of closely reasoned decisions that aim to give full effect to rights even if that means some incursion into national immigration control. However, some decisions are placed more firmly than others in an immigration context. This is particularly likely when derived rights or other family members are in question as their ambit is less certain than the main rights under the Directive and they are most often utilised by those who cannot qualify under national laws. Sometimes, this concern is expressed openly. On other occasions, it is detectable through the language used or the way the decision is framed with the primary issue being the status as migrant rather than the EU law rights. When discussing cases with an immigration component, the courts seem more likely to refer to the implementing regulations rather than the Directive, a way of distancing the discussion from fundamental

EU principles. These decisions are less likely to engage not only with the Directive but with the legal context in which the Directive sits. The discussion here has focused on the higher courts with some cases taken from the Upper Tribunal; it is likely that this tendency is even more marked in the Lower Tribunal.<sup>153</sup>

## 6. CONCLUSION

Since 2006, there has been widespread concern expressed by some politicians and media about the number of migrants entering the United Kingdom and the United Kingdom's lack of control over European free movement rights. This, alongside generalised distrust in the United Kingdom of the European Union, has had a visible effect on implementation of free movement law. Amendments to the Regulations have largely been forced on successive governments by jurisprudence of the CJEU. Although these have forced the Home Office to accept a widening of European free movement law in some areas as discussed above, they have been accepted begrudgingly and as narrowly as possible. No doubt many of these amendments will lead to litigation in the future. The higher courts have generally done their best to ensure that rights are given effect but, in some instances, a fear about the immigration consequences of EU rights and a leaning towards approaches adopted from domestic immigration are visible.

The political dimension should not be underestimated. The current government has adopted a target-driven approach to its aim of reducing the number of migrants entering the UK. The general negative rhetoric about immigrants and about EU migration in particular does seem to have affected the administrative practice. The quality of

<sup>152</sup> *SSHD v FV (Italy)* [2012] EWCA Civ 1199.

<sup>153</sup> *Shaw, Miller and Fletcher* n. 6, 44-45.

decision making and lack of communication is of major concern. The result is that applications are wrongly refused and have to be appealed. Concern about abuse seems to have intensified leading to tightened domestic provisions on applications based on relationships and there are far more widespread allegations of sham marriages with corresponding refusals. It often appears that the correct burden of proof is not applied so that applicants are expected to show that the marriage is genuine, reversing the burden of proof. Meanwhile, concerns about 'benefits tourism' have made access to services and benefits much more difficult.

The Directive aims to facilitate the free movement of people and contrasts with the much more state-centred restrictive and prescriptive orientation of domestic immigration law. It therefore poses a particular challenge to government and the courts. It seems likely that continuing litigation on a case by case basis, some pressure, albeit limited, on the United Kingdom government by the Commission and a general concern in the United Kingdom about numbers of migrants, coupled with scepticism about the European Union, will continue to shape the application of the Directive in the United Kingdom for the foreseeable future.

MINISTERIO DE EMPLEO Y SEGURIDAD SOCIAL

**ABSTRACT** This article analyses the transposition of Directive 2004/38 into the British legal system. Firstly, it summarises the historical, political and legal context. Then, it explains how the Directive has been implemented, the administrative practice in its application and the response of the British courts.

**Keywords:** free movement of EU workers, family members, reunification, access to benefits, British judicial decisions.

**RESUMEN** Este artículo analiza la adaptación de la Directiva 2204/38 en el sistema legal británico. Aborda en una primera parte una síntesis del contexto histórico, político y legal para pasar a explicar cómo se ha implementado la Directiva, la práctica administrativa en su aplicación y la respuesta de los tribunales británicos.

**Palabras clave:** Libre circulación de trabajadores de la UE, miembros de la familia, reagrupamiento, acceso beneficios, decisiones judiciales británicas.